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Rec'd 11/10/84

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

IN RE:	
TARACORP, INC., a/k/a EVANS METAL COMPANY, SEITZINGERS, IMACO, and TARACORP INDUSTRIES,	CHAPTER 11
Debtor.	JUDGE HUGH ROBINSON
	CASE NO. 82-04654A
TARACORP, INC., a/k/a EVANS METAL COMPANY, SEITZINGERS, IMACO and TARACORP INDUSTRIES,	
Plaintiff,	ADVERSARY PROCEEDING
VS.	NO. 83-2063A
PEOPLE OF THE STATE OF ILLINOIS ex rel. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	
Defendant.	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

FACTUAL BACKGROUND

Taracorp, Inc., Debtor and Plaintiff in the above-referenced action ("Taracorp") files this brief in opposition

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to the motion to dismiss filed by the State of Illinois ("Illinois"). On October 24, 1983, Taracorp filed its Objection to Proof of Claim, Affirmative Allegations, and Application for Injunctive Relief against Defendant Illinois. Taracorp therein requested injunctive relief against certification by Illinois of Taracorp's Granite City, Illinois property on the National Priorities List ("the Superfund List") created by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq. Illinois has filed a motion to dismiss Plaintiff's application for injunctive relief on two grounds: lack of jurisdiction and failure to state a claim.

ARGUMENT AND CITATION OF AUTHORITIES

I. This Court Clearly has Jurisdiction over Plaintiff's Claims.

As essentially courts of equity, bankruptcy courts have jurisdiction "to deal with the assets of the bankrupt they are administering." Katchen v. Landy, 382 U.S. 323, 327 (1966). By virtue of filing its proof of claim herein, Illinois is subject to this Court's equity jurisdiction. Katchen v. Landy, supra. See also 11. U.S.C. § 105(a).

Illinois argues that this Court lacks jurisdiction to enjoin its enforcement of state environmental laws. Illinois relies upon the exception to the automatic stay contained in Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4), which excludes "an action or proceeding by a

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governmental unit to enforce such governmental unit's police or regulatory power" from the automatic stay of Section 362(a)(1). The crux of Illinois' argument is the portion of the legislative history quoted at page 3 of its brief. The portion quoted by Illinois does contain language indicating that a governmental suit to prevent violation of environmental protection laws "is not stayed under the automatic stay." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 343, reprinted in [1978] U.S. Code Cong. & Ad. News 5787, 6299. Illinois argues that this exemption means "that Congress did not intend to vest jurisdiction in the Bankruptcy Court to enjoin governmental units in enforcing environmental protection laws." (Brief of Illinois at page 4.)

Illinois has overlooked the introductory section of the legislative history dealing with Section 362(b) as a whole, which provides as follows:

> Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.
>
> The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of Title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity and admiralty (H.R. 8200, § 243(a), proposed 28 U.S.C. 1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the

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> court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the Court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

H.R. Rep. No. 95-595, supra at 342, [1978] U.S. Code Cong. and Ad. News, supra at 6298 (emphasis added).

This legislative history expressly states that an exception to the automatic stay does not "make the action immune from injunction". Thus, for the purposes of determining jurisdiction, it is not necessary for this Court to determine at this time whether or not the Section 362(b)(4) exception applies. Even if the exception does apply, it is clear that nothing in the Bankruptcy Code or its legislative history operates to divest this Court of jurisdiction. On the contrary, the legislative history strongly indicates that this Court "has ample other powers to stay actions not covered by the automatic stay."

The only other support cited by Illinois is In the Matter of Canarico Quarries, Inc., , 466 F. Supp. 1333 (D.P.R. 1979). That case is distinguishable in that the debtor therein had voluntarily stipulated that it was operating in violation of applicable environmental laws of Puerto Rico. See id. at 1334. Accordingly, the court concluded that former Bankruptcy Rule 11-44(a) should not be applied to authorize the debtor to operate without legal permits. The court did not base its decision on lack of jurisdiction; rather, the court concluded

that the automatic stay of former Rule 11-44(a) did not apply. Moreover, Canarico was decided under the old Bankruptcy Act, prior to the greatly expanded jurisdiction of the bankruptcy courts under the present Code. See 28 U.S.C. § 1471.

Other courts have found such jurisdiction to exist and have enjoined various regulatory activities. In Securities & Exchange Commission v. First Financial Group of Texas, 645 F. 2d 429 (5th Cir. 1981), the court stated that to the extent appointment of a receiver as a part of governmental enforcement "threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of those proceedings". Id. at 440. In In re Kovacs, 681 F.2d 454 (6th Cir. 1982), vacated and remanded on the issue of mootness, _____ U.S. _____, 74 L.Ed.2d 1010 (1983), the Sixth Circuit held that the automatic stay of Section 362 applied to a motion in a state court for a hearing to determine the debtor's present income. The Sixth Circuit concluded that the state was attempting to obtain an order requiring payments by the debtor toward a receiver's efforts to clean up an industrial waste site. In In the Matter of Penn Terra, Ltd., 24 B.R. 427 (Bankr. W.D.Pa. 1982), the court similarly concluded that the state's lawsuit seeking an injunction requiring the debtor to expend funds to correct violations of state surface mining laws was subject to the automatic stay of Section 362.

Kovacs and Penn Terra, supra assumed the bankruptcy court's jurisdiction and applied the automatic stay. The court

in Island Club Marina, Ltd. v. Lee County, Florida, 32 B.R. 331 (Bankr. N.D. Ill. 1983) addressed the jurisdictional issue more directly. The debtor had sought declaratory relief against the county's informal indications that the county no longer considered the debtor's building permit to be valid. The county moved to dismiss the complaint on the basis that the court had no jurisdiction over issues of state law. The court rejected this argument, based upon Northern Pipeline Construction Company v. Marathon Pipeline Company, ____ U.S. ____, 102 S.Ct. 2858 (1982). The court concluded that it retained jurisdiction under 28 U.S.C. § 1471.

Taracorp submits that the only way this Court could find that it lacks jurisdiction would be to hold that the Emergency Rule is invalid. The District Court for the Northern District of Georgia has uniformly upheld the validity of the Emergency Rule. See, e.g., In re Seven Springs Apartments, Phase II, 11 B.C.D. 170 (N.D. Ga. 1983). Based on the foregoing authorities, it is clear that this Court does in fact have jurisdiction over Taracorp's claim.

II. The Complaint States a Claim upon Which Relief can be Granted.

Illinois argues that the Complaint fails to state a claim for injunctive relief because it does not expressly allege irreparable harm and the inadequacy of legal remedies. Illinois cites two cases in support of the proposition that a plaintiff seeking injunctive relief "must demonstrate that

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there is an 'inadequacy of a legal remedy and that there is irreparable harm...." (Brief of Illinois at page 6.) Taracorp agrees with this proposition; however, Illinois has cited no cases concerning the adequacy of a complaint to state a claim for injunctive relief. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In the present case, the placing of Taracorp's Granite City property on the Superfund List will inevitably diminish the property to a fraction of its present value. Based on Taracorp's experience after its facility in St. Louis Park, Minnesota, was placed on the Superfund List, the property could have a negative value. Taracorp will be prepared to present evidence supporting the need for injunctive relief at the hearing on January 19, 1984. In any event, Taracorp is filing a Motion for Leave to Amend its Complaint to state more specifically the irreparable harm it faces. Courts generally grant leave to amend a complaint in such circumstances. See, e.g., Griggs v. Hinds Junior College, 563 F.2d 179, 180 (5th Cir. 1977). Accordingly, the Complaint should not be dismissed for failure to state a claim.

III.

CONCLUSION

For the reasons stated above, Illinois' Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following counsel with a true and correct copy of PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS by depositing the same in the United States mail with sufficient postage thereon to insure delivery addressed to:

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This 5th day of January, 1984.

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